

STATE OF MICHIGAN
COURT OF APPEALS

NATIONSBANC MORTGAGE CORPORATION
OF GEORGIA, f/k/a CITIZENS AND
SOUTHERN MORTGAGE CORPORATION,

Plaintiff-Appellant,

v

JERRY LUPTAK, JERRY D. LUPTAK
REVOCABLE TRUST, NINA LUPTAK, NINA
D. LUPTAK REVOCABLE TRUST, HAROLD
BEZNOS, HAROLD BEZNOS REVOCABLE
TRUST, NORMAN BEZNOS, NORMAN
BEZNOS REVOCABLE TRUST, MAURICE
BEZNOS, MAURICE JERRY BEZNOS
REVOCABLE TRUST and SHELDON KORN,¹

Defendants,

and

THE KORN FAMILY LIMITED PARTNERSHIP,

Garnishee Defendant-Appellee.

FOR PUBLICATION
December 12, 2000
9:10 a.m.

No. 212634
Oakland Circuit Court
LC No. 93-453050-CZ

Updated Copy
February 2, 2001

Before: Holbrook, Jr., P.J., and Kelly and Collins, JJ.

KELLY, J. (*concurring in part and dissenting in part*).

I agree with the majority that, under MCR 3.101, the writ of garnishment provided adequate notice of the nature of the proceedings to garnishee defendant, the Korn Family Limited Partnership (KFLP). Our Supreme Court held long ago that a writ of garnishment alleging that the garnishee has property, money, and so forth, in its hands or under its control belonging to the defendant is sufficient, and more detail regarding why the garnishee is liable is not required.

Connor v Third Nat'l Bank of Detroit, 90 Mich 328, 333-334; 51 NW 523 (1892). I disagree, however, that a transfer is not "void" until it is established to be so in a separate action brought under the Uniform Fraudulent Conveyances Act (UFCA), MCL 566.11 *et seq.*; MSA 26.881 *et seq.*

Defendant Sheldon Korn, and others, personally guaranteed a corporate loan. When the corporate debtor defaulted, plaintiff filed suit in Florida to collect on the personal guarantees. A judgment was entered in favor of plaintiff in 1992 in an amount in excess of \$2 million. In 1993, plaintiff filed suit to enforce the judgment in Michigan and judgment was entered in favor of plaintiff in 1996. At a creditor's examination, it was learned that Sheldon Korn had transferred his interests in five real estate limited partnerships valued at over \$2 million to the KFLP, which had been formed shortly after plaintiff issued its demand letter. The transfers left Sheldon Korn insolvent. On the basis of Sheldon Korn's testimony regarding consideration given for the transfers, plaintiff believed the transfers to be fraudulent.

The trial court reasoned that, because under the UFCA there are several ways to establish a conveyance to be fraudulent, the implication is that a conveyance is not fraudulent until established to be so under the UFCA. Thus, the court ruled, and the majority concurs, that plaintiff was required to file a separate action to void the fraudulent conveyance before seeking the writ of garnishment. I disagree.

In a garnishment proceeding, the affidavit acts as the plaintiff's complaint against the garnishee defendant and the garnishee's disclosure serves as the answer. MCR 3.101(M)(2). If there is a dispute regarding the garnishee defendant's liability, the issue shall be tried in the same manner as other civil actions. MCR 3.101(M)(1). To aid in determining the garnishee

defendant's liability, the plaintiff may offer the record of the garnishment proceeding and other evidence. The garnishee defendant may offer evidence not controverting the disclosure or, in the discretion of the court, may show errors or mistakes in the disclosure. MCR 3.101(M)(5). These rules clearly indicate that disputes over the validity of a transfer affecting the garnishee's liability shall be tried in the garnishment proceeding.

The court rules provide that a garnishee defendant is liable for the property of the principal defendant that it holds by conveyances or transfers of title that are "void as to creditors of the defendant" MCR 3.101(G)(1)(h). Several decisions have recognized the use of garnishment proceedings to reach fraudulently conveyed property of a debtor. See 10A Michigan Pleading & Practice (2d ed), Garnishment, § 75.27, pp 572-573, and cases cited therein. The issue in this case was whether the transfer was a bona fide transaction upon sufficient consideration and free from fraud. *Long v Evening News Ass'n*, 113 Mich 261; 71 NW 492 (1897); *Mihajlovski v Elfakir*, 135 Mich App 528, 534; 355 NW2d 264 (1984). The circuit court had to reach this issue in order to render a judgment in garnishment. I see no justification for requiring a separate action declaring a fraudulent conveyance void under the UFCA before a creditor may proceed against a garnishee defendant who holds property by way of such a transfer.

I would reverse and remand for trial on the issue of the KFLP's liability.

/s/ Michael J. Kelly